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IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

KAISER CEMENT CORPORATION,

Petitioner,

v.

LAKE ASBESTOS OF QUEBEC, LTD., *et al.*,

Respondents.

KAISER CEMENT CORPORATION'S REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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Kaiser Cement's Petition seeks review of a decision by a divided panel of the Third Circuit Court of Appeals that dramatically expands federal jurisdiction to adjudicate state law claims through the Rule 23(b)(3) class action device. Both plaintiffs' Consolidated Opposition and LAQ's Brief in Opposition attempt to downplay the decision's far-reaching impact. However, neither disputes that the Court of Appeals permitted the district court to dismiss with prejudice the claims of all members of the nationwide, diversity-based class against settling defendant LAQ even though

- the complaints alleged that some class members did not have claims in excess of $10,000 and defendants had established that 60% could not satisfy the amount in controversy requirement of 28 U.S.C. § 1332(a);
- the complete diversity requirement of § 1332(a) also could not be met because some named class repre-

sentatives and many, if not most, plaintiff class members were citizens of the same states as some of the defendants; and

- the complaints presented claims for injury to real property located outside the forum state in contravention of decisions by this Court that the local action doctrine requires such claims to be decided by a court sitting in the state where the property is found.

Kaiser Cement's Petition pointed out that it was improbable that these jurisdictional rulings could be confined to the present case in light of current interest in the use of class action procedures as a means of dealing with so-called "mass tort" claims arising under state laws. In this atmosphere, the Third Circuit's rulings, if allowed to stand, provide a misleading jurisdictional signal to other district courts and to legislators considering proposals to encourage such class actions. Rather than ceding such influence to the panel's majority opinion, Kaiser Cement urged the Court to grant its Petition in order to provide needed guidance to the lower courts and to Congress.

I. PLAINTIFFS' RELIANCE ON THE JUDICIAL IMPROVEMENTS ACT OF 1990 ITSELF DEMONSTRATES THE IMPORTANCE OF REVIEWING THE COMPLETE DIVERSITY OF CITIZENSHIP ISSUE.

In response to Kaiser Cement's reasons for granting its Petition, plaintiffs contend (at 11) that this Court's guidance is no longer necessary because Congress has already "spoken to the problem. The Judicial Improvements Act of 1990 gives a clear answer."[1] However, plaintiffs do not claim that this Act provides any answer to the local action or amount in controversy issues raised herein. Even with regard to complete diversity of citizenship, plaintiffs acknowledge (at 13) that the Act does not govern this case

[1] Plaintiffs' repeated protestations that the Third Circuit's jurisdictional rulings are not "special or important" is belied by the fact that the cover of their Opposition indicates that it required the efforts of two dozen class action lawyers (counting Professors Wright and Miller) to respond to Kaiser Cement's Petition.

or other diversity-based class actions that were filed prior to December 1, 1990 but argues (at 12-13) that the Act has resolved the complete diversity of citizenship issue for class actions filed after December 1, 1990.

This attempt to minimize the Third Circuit's decision as affecting "only" pre-December 1, 1990 filings is at odds with plaintiffs' own recognition (at 12) that Congress expressly directed that the Judicial Improvements Act of 1990 was "not intended to affect the jurisdictional requirements of 28 U.S.C. § 1332 in diversity-only class actions, as those requirements were interpreted prior to *Finley*." Nor did Congress spell out these requirements beyond citing *Supreme Tribe of Ben-Hur v. Cauble*, 255 U.S. 356 (1921) and *Zahn v. International Paper Co.*, 414 U.S. 291 (1973). *See* Petition at 16 & n.9.

Thus, determining whether 28 U.S.C. § 1332(a)'s complete diversity requirement applies to Rule 23(b)(3) class actions filed after December 1, 1990 will turn on the interaction between *Ben-Hur* and *Zahn*. Indeed, plaintiffs concede that the issue is the same when they assert (at 13) that, prior to *Finley*, "only the citizenship of the named parties mattered" and that, after December 1, 1990, "only the citizenship of the named parties matters."[2]

In the present pre-December 1, 1990 case, plaintiffs assert that *Ben-Hur*, rather than *Zahn*, controls the juris-

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[2] If anything illustrates the need for guidance in this area, it is plaintiffs' claim (at 12) that "diversity is required only between the named representatives of the class and the opponents of the class." In the present case, it is undisputed that some of the "named representatives of the class" such as the School District of Lancaster, a citizen of Pennsylvania, are not diverse from some of the "opponents of the class" such as defendant Pittsburgh Corning, also a Pennsylvania citizen. *See* Petition at 22 n.11.

The Third Circuit's affirmance of the LAQ final judgment in the face of this lack of diversity between even the "named parties" is directly in conflict with the Second Circuit's decision in *In re Agent Orange Product Liability Litigation*, 818 F.2d 145, 162 (2d Cir. 1987).

dictional requirements for a Rule 23(b)(3) class action. But, as demonstrated in Kaiser Cement's Petition (at 23-24), the class action involved in *Ben-Hur* was not a Rule 23(b)(3)-type, where class members are permitted to join their separate and distinct claims. It was instead a contest for control of a fund in which all class members had a common but indivisible interest. In *Aldinger v. Howard*, 427 U.S. 1, 11 (1976), the Court explained that *Ben-Hur* had permitted this type of class action to proceed on the basis of the citizenship of only the named parties by invoking "ancillary" jurisdiction over non-diverse absent class members so that their interests in the common fund would be protected. However, in the absence of the necessity created by such a common fund, *Zahn* rejected resort to such ancillary jurisdiction principles in Rule 23(b)(3) class actions. *See Owen Equipment & Erection Co. v. Kroger*, 437 U.S. 365, 372 (1978). Nonetheless, plaintiffs characterize (at 12) such class actions as being subject to a subset of an "established rule" governing "representative" actions that requires diversity only among the named parties.

But *Zahn* did not adopt a "representative-action" rule for Rule 23(b)(3) class actions; instead, it held that such class actions were subject to the same jurisdictional "rule" that governed "named plaintiffs joining in an action." Under this joinder rule, the "matter in controversy" of each class member must independently satisfy the amount in controversy requirement of 28 U.S.C. § 1332(a). *See* 414 U.S. at 300-01 & n.9. Kaiser Cement submits that *Zahn*'s interpretation of the "matter in controversy" language in 28 U.S.C. § 1332(a) leads inescapably to the conclusion that each defendant and each member of a Rule 23(b)(3) class must also satisfy the citizenship requirement of that statute, *i.e.*, each must be "citizens of different States." Whether or not Kaiser Cement is correct on this score, the time has come to resolve the issue not only because of its significance for the present litigation[3] but also be-

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[3] Plaintiffs claim (at 1) that "much progress has been made in eight years of the present litigation," since "[s]ettlements totaling in excess

cause it will impact on a number of currently pending cases as well as those filed in the future.

This issue may also substantially affect legislative initiatives directed at court reform. For example, after the Petition herein was filed, the Judicial Conference of the United States approved a Report of its Ad Hoc Committee on Asbestos Litigation,[4] which concluded (at 36) that "the costs and burdens of federal asbestos litigation could be lessened . . . if Congress would expressly authorize class actions or collective trials." The Report also recommended (at 37-38) that the Advisory Committee on Civil Rules should "study whether Rule 23 of the Federal Rules of Civil Procedure should be amended to accommodate the demands of mass tort litigation."

Despite making these recommendations, the Committee's Report did not explore jurisdictional limitations on the use of Rule 23 class actions to adjudicate state law claims or purport to find that the Judicial Improvements Act of 1990 had swept away those limitations. Before Congress and the Advisory Committee undertake the efforts recommended by the Judicial Conference, it is of "paramount importance" that they do so against a "background of clear interpretative rules" governing the jurisdictional limits on Rule 23 class actions. *Cf. Finley v. United States*,

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of $40 million have been reached between the class and six of the defendants" and since "trial" is scheduled to begin in 1991.

For a more complete description of the phase 1 trial schedule, *see* note 7 *infra*. As for settlements, the district court has actually approved only four totalling less than $6 million. A substantial portion of the discrepancy between $6 million and $40 million can be explained by the fact that, before going bankrupt, defendant National Gypsum entered into an agreement to use its best efforts to persuade its insurers to pay $31 million to settle this litigation. However, National Gypsum's counsel recently reported that its insurers refused to pay and that the settlement agreement has now expired. *See Mealey's Litigation Reports*: Asbestos, p. 43 (March 15, 1991).

[4] Report Of The Judicial Conference Ad Hoc Committee On Asbestos Litigation To The Chief Justice Of The United States And The Members Of The Judicial Conference Of The United States (March 1991).

490 U.S. 545, 556 (1989). Therefore, notwithstanding plaintiffs' understandable desire to avoid review, the Court should resolve the complete diversity of citizenship issue for Rule 23(b)(3) class actions.

II. REVIEW OF THE AMOUNT IN CONTROVERSY AND LOCAL ACTION JURISDICTIONAL ISSUES IS SIMILARLY IMPORTANT.

Plaintiffs offer no substantial reasons why the Court should not grant review of the other two subject matter jurisdiction issues raised by Kaiser Cement's Petition. As to the amount in controversy issue, plaintiffs contend (at 9) that the district court merely acted pursuant to the express authority provided by Fed. R. Civ. P. 12(d) in deferring the dismissal of class members with jurisdictionally insufficient claims "until the trial." As a fall back position, they also contend (at 10) that, in any event, the issue is now "moot" because the class definition has recently been amended to exclude most of the class members that are unlikely to have claims in excess of $10,000.[5]

Both of these contentions ignore that Kaiser Cement's Petition seeks review of a *final judgment* that dismissed with prejudice the claims of all members of the original, unamended class. Perhaps in anticipation of this rejoinder, plaintiffs further argue (at 14-15) that the "settling parties" were fully aware that some class members would be unable to assert claims in excess of $10,000 and that "[a]ll parties" accepted that such class members would not be bound by the LAQ settlement.

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[5] Although plaintiffs' Opposition intimates to the contrary (at 3 and nn. 9, 10; 4 & 10), the complaints below continue to allege on their face that some members of the amended class do *not* have claims in excess of $10,000 and the district court has *not* found that each member of the amended class can in good faith allege a claim in excess of $10,000. *See* Pretrial Order No. 273 and accompanying Memorandum reproduced in plaintiffs' Appendix at A-2.

Kaiser Cement admits that, in this instance, it does not understand the thrust of plaintiffs' argument, because it appears to suggest that the LAQ judgment was entered in error. However, rather than confessing error, it seems more likely that plaintiffs are advocating that a district court should be free to enter final judgment without regard to jurisdiction, leaving to subsequent courts faced with determining the judgment's *res judicata* effect the task of sorting out the jurisdictional issues.[6] In this respect, the uncertain impact of the LAQ final judgment simply highlights the fundamental problem underlying the lower courts' general conclusion that Rule 12(d) provides an excuse for deferring the correction of admitted jurisdictional defects "until the trial."

During the course of managing any complex nationwide class action, a district court will inevitably be required to make rulings prior to trial that substantially affect the rights of defendants and of absent class members. In the present case, the district court has already entered summary judgments dismissing with prejudice (i) the claims of all class members against defendant Combustion Engineering and (ii) the claims of many class members located in Georgia, Virginia and Hawaii against all defendants. However, the parties have no idea as to which (or how many) of those class members possess jurisdictionally sufficient claims and the district court only contemplates identifying them in the event that defendants lose on all liability

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[6] Plaintiffs assert (at 4) that Kaiser Cement's concern that class members might collaterally challenge the settlement "involves a speculative and hypothetical possibility." However, such challenges are not rare or without success. *See* Miller & Crump, *Jurisdiction And Choice Of Law In Multistate Class Actions After Phillips Petroleum Co. v. Shutts*, 96 Yale L.J. 1, 36 n.247 (1986).

Indeed, recent news reports indicate that the settlement in the *Agent Orange* litigation has been subject to repeated collateral attacks by disgruntled class members. *E.g., The Wall Street Journal*, March 6, 1991, at B1, Col. 6; *see Ivy v. Diamond Shamrock Chemicals Co.*, 901 F.2d 7 (2d Cir. 1990).

issues and years from now the litigation eventually does proceed to a damage trial phase.[7]

In sum, under the jurisdictional approach adopted by the lower courts here, there is no basis for determining whether summary judgments or similar rulings have any binding effect. Avoidance of such judicial gridlock is one of the reasons that courts of limited jurisdiction traditionally have been forbidden to act on the merits until they have established their jurisdiction. *See United States Catholic Conference v. Abortion Rights Mobilization, Inc.*, 487 U.S. 72 (1988). To prevent the Third Circuit's decision from establishing a contrary jurisdictional philosophy based on what plaintiffs describe (at 2) as "fruitful and imaginative efforts" to maintain diversity-based class actions, the Court should grant review.

With respect to the Third Circuit's decision that tort claims for injury to real property are not subject to the local action doctrine, plaintiffs argue (at 15) that review is inappropriate because "there is no conflict among the courts of appeals."[8] Plaintiffs do not contend that any other court of appeals has ever endorsed the Third Circuit's view of the local action doctrine, and they do not deny that the Third Circuit's ruling conflicts with this Court's decisions in *Ellenwood v. Marietta Chair Co.*, 158 U.S. 105 (1895) and *McKenna v. Fisk*, 42 U.S. (1 How.) 241 (1843) and with Chief Justice Marshall's opinion in *Livingston v. Jefferson*, 15 F. Cas. 660 (C.C.D. Va. 1811).

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[7] *See* Kaiser Cement App. 79a. Plaintiffs report (at 1) that the "district court is ready to begin trial this Summer or early Fall, 1991." The Court should be aware that the previously scheduled "first phase" trial would have dealt only with seven purported "common" factual issues. *See* Kaiser Cement App. 57a-58a. More recently, the district court determined that such a seven-issue trial would be unmanageable and announced that only one issue would be tried initially.

[8] The Third Circuit's decision does conflict with numerous decisions of state appellate courts. *E.g.*, *McCormick v. Brown*, 297 S.W.2d 91, 92 (Tenn. 1956) (injury to Georgia residence as a result of blasting operations at nearby quarry was local action and therefore Tennessee courts lacked jurisdiction to entertain negligence action).

Although the existence of inconsistent interpretations among appellate courts is usually a strong indicator of the need for review, where, as here, the Court of Appeals' decision is inconsistent with long-established precedents of this Court, review is also appropriate, since what is at stake is the authority of the Court and ultimately of Congress to determine the limits of district court jurisdiction.

Finally, plaintiffs suggest (at 15) that Kaiser Cement lacks "standing to complain." Plaintiffs' standing objection disregards that the Third Circuit explicitly concluded that the district court had subject matter jurisdiction and that jurisdiction on appeal was proper. Kaiser Cement App. 6a. The Court of Appeals then proceeded to the merits and upheld the district court's ruling that Kaiser Cement lacked standing to challenge defects in the Rule 23(e) settlement approval process. *Id.* 10a.[9]

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[9] The second question presented in Kaiser Cement's Petition deals with this standing ruling. Rather than disputing Kaiser Cement's claim that its resolution will significantly affect the conduct of multi-defendant, diversity-based class actions in general, plaintiffs' Consolidated Opposition (at 14) and LAQ's Brief in Opposition (at 6-11) argue that the district court's standing ruling was correct.

Neither opposition, however, questions Judge Cowen's showing below that, as a matter of law in many jurisdictions, the district court's approval of the settlement extinguished Kaiser Cement's contribution rights against LAQ. Kaiser Cement App. 14a. In this respect, state law produces precisely the same effect as the "bar order" that afforded standing to non-settling defendants in *Kaypro*—a result that LAQ cites (at 9) with apparent approval. Likewise, neither opposition addresses the significance of the district court's ruling that, in exchange for defendants' loss of contribution rights, all class members "agree to adjust any subsequent recovery from non-settling defendants by any portion of the recovery attributable to LAQ." *Id.* 21a. Yet, it is uncertainty as to the enforceability of this ruling that Kaiser Cement sought to confront by raising defects in the settlement approval process.

It is no answer to assert, as does LAQ (at 11), that the district court's obligation to review the settlement notice and LAQ's interest in insuring its maximum preclusive effect, "adequately protect Kaiser's interests as a matter of law." Until the rulings below, it was unquestioned that a defendant, like Kaiser Cement, had standing to protect its own interests and to question whether the district court had in fact

It is beyond dispute that Kaiser Cement had standing to appeal from the district court's decision that it lacked standing to raise such defects. *In re Pittsburgh & Lake Erie R.R. Co. Securities & Antitrust Litigation*, 543 F.2d 1058, 1064 (3d Cir. 1976) ("party denied standing . . . to object, may obviously appeal such a determination"); *see Warth v. Seldin*, 422 U.S. 490 (1975). Prior to reaching this issue, the Court of Appeals also had a "special obligation" to determine whether the district court had subject matter jurisdiction to issue the complained-of order. *Bender v. Williamsport Area School District*, 475 U.S. 534, 541 (1986). Because Kaiser Cement was aggrieved by the Court of Appeals' rulings on both standing and jurisdiction, it has standing to present those issues to this Court.

III. CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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met its obligation to review the settlement notice procedures. Given the significance of this standing decision, the Court should grant review so that its merits can be debated in full.